

## **EXHIBIT 2**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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)  
IN RE PORT ANTITRUST )  
LITIGATION )

File No. 18-cv-1776  
(JRT/HB)

)  
)  
This Document Relates to: )

)  
Direct Action Plaintiffs )

St. Paul, Minnesota  
Courtroom 7C  
December 17, 2021  
Via Video Conference  
2:49 p.m.  
)  
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BEFORE THE HONORABLE HILDY BOWBEER  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
**(INFORMAL DISPUTE RESOLUTION CONFERENCE)**

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1 counsel in this case, and will understand that the DAP group  
2 should have and had only one shot at additional terms. And  
3 they -- the burden will be very high for any new additional  
4 DAPs so seek new terms beyond those that we are seeking now.

5 So to conclude I think all we're asking for here  
6 is at least one fair shot for some search terms that we  
7 believe are relevant and important to the case. And in the  
8 absence of any substantiation of defendants' burden  
9 objection, their objection should be overruled and those  
10 terms -- and they should be instructed to provide those  
11 terms.

12 THE COURT: Let me ask --

13 MR. MITCHELL: -- those terms.

14 THE COURT: Let me ask you some questions and then  
15 I'll give Mr. Taylor a chance to speak.

16 First, have you looked at what you've already  
17 gotten? And what can you tell me, if anything, about what  
18 gaps you've identified in what you've received?

19 And a part of what I'm struggling with here is  
20 that, you know, search terms are a means to an end. Search  
21 terms are not in and of themselves clearly relevant or not  
22 relevant, but they're designed to try to get at relevant  
23 information but they tend to pull up a whole bunch of stuff  
24 that isn't along with what may turn out to be relevant.

25 So I'm -- we can't pretend that a whole lot of

1 work hasn't already been done in this case and a whole lot  
2 of documents already provided in response to requests by  
3 excellent experienced plaintiffs' counsel for the class  
4 plaintiffs.

5 So what -- what can you tell me about the analysis  
6 of -- you've made of what you've got already and why you  
7 believe there are gaps, you know, sub -- yeah, gaps in that  
8 production?

9 MR. MITCHELL: Sure.

10 So first, I think it is obviously always difficult  
11 to access in the abstract what you are missing. We don't  
12 know what documents are missing from the documents that have  
13 been produced.

14 Now that said, we have made an effort to take the  
15 terms that are at issue and apply them to the existing  
16 productions to see what those terms might yield. And I can  
17 take you through a few examples if it would be helpful.

18 THE COURT: Mm-hmm.

19 MR. MITCHELL: For example, Term Number 11 in our  
20 spreadsheet, Rabo, relates to Rabobank. Now that is a term  
21 that all defendants, except Hormel, have agreed to run or  
22 some version of it. And we are simply asking now for Hormel  
23 to run that term given that the other defendants have agreed  
24 to do so it.

25 And when we run that term across the defendants'

1 the exact date. I want to say a few weeks ago we received  
2 from each of the defendants written responses and objections  
3 to the direct action plaintiffs RFPs. We are in the process  
4 of reviewing those.

5 I will say that there appear to be substantial  
6 differences among the defendants as to the responses.

7 So assessing who has agreed to provide documents  
8 in response to which request is the process that we are  
9 undertaking right now to identify any issues that we may  
10 have with those responses so that we can bring them to the  
11 attention of the defendants. We are very much in the middle  
12 of that process right now.

13 THE COURT: Okay. All right. All right.

14 Let me take a couple of minutes off screen to  
15 think about my ruling here. And I will be back on in just a  
16 moment. I will stop the recording in the meantime.

17 (Recess at 3:28 p.m.)

18 (Reconvene at 3:50 p.m.)

19 THE COURT: All right. Thank you for your  
20 patience. It looks like we may have had some attrition  
21 among the attendees, but we are back on the record in  
22 connection with the IDR proceeding with regard to the  
23 dispute between the MDL direct action plaintiffs and the  
24 defendants about search terms.

25 I am going to deny the MDL DAPs' request for an

1 order that defendants run their 90 -- I think it was 90,  
2 proposed global terms.

3 Unlike the cases that were cited -- the case law  
4 that was cited in the plaintiffs letter we're not writing on  
5 a blank slate here and the defendants have already responded  
6 to discovery requests that involved tremendous overlap in  
7 the issues and have produced millions of documents.

8 The search strategy that led to that production  
9 was negotiated over a significant period of time with highly  
10 capable class counsel who have been living with this case  
11 since 2018. So this isn't a situation in which lawyers who  
12 don't know which end is up in antitrust litigation were  
13 somehow overmatched or overborne in negotiating search terms  
14 with defense counsel.

15 And so I think that does shift the proportionality  
16 analysis in some significant ways.

17 Proportionality requires that we look at the  
18 incremental value of the additional discovery sought. And  
19 so in this scenario I don't agree with -- Mr. Mitchell, with  
20 your -- with the position that you're entitled to your one  
21 free shot on search terms. I think that because of the  
22 consolidation of the cases that simply isn't true here. The  
23 consolidation did change that calculus and changed that  
24 paradigm.

25 And the case law, of course, is plentiful that one

1 side isn't entitled to have the other side search for every  
2 single responsive document in any event.

3 So I do think in this instance that defendants are  
4 correct that the burden starts with the direct action  
5 plaintiffs to assess what you have already and to be able to  
6 explain to the defendants with some specificity how what you  
7 have is deficient and why that gap -- like why the documents  
8 that you hope would fill that gap would have incremental  
9 value that is important to the resolution of issues in the  
10 case.

11 As for burden, you're absolutely, right, Mr.  
12 Mitchell, that ordinarily, and I'm not ruling that out down  
13 the line as you will see, but ordinarily defendants do have  
14 an obligation to show the burden part of the proportionality  
15 analysis. But, again, we're not writing on a blank slate  
16 here and it does take into account about what has already  
17 been done.

18 And so I think particularly in a case where  
19 several hundred search terms have already been run and  
20 several million documents already produced, I don't think  
21 that defendants have to come up with search term hit lists  
22 for me to conclude that running another 90 terms, many of  
23 which do contain some very generic language and are  
24 definitely overlapping with what's already been done, I  
25 don't need a bunch of hit lists to tell me that that creates

1 a significant burden and that you haven't shown me enough to  
2 conclude that the incremental value of those searches  
3 justifies that burden.

4 But before the defendants go off, you know,  
5 irrationally exuberant, there is a sliding scale here and I  
6 am not deciding at this point that it is required that the  
7 additional value you show or the gap you identify has to be  
8 unique to the particular DAP or to the -- or the unique  
9 position of the DAPs in this case.

10 I think that that can -- I think that that is a  
11 relevant factor but I'm not saying that's the sine qua non  
12 of you being able to ask for more.

13 So, for example, if after you review the documents  
14 you have you can show that there's a limited number of  
15 precise additional search terms that was needed to capture  
16 something that those other guys missed, even if it wasn't  
17 necessarily tied to who you are as a plaintiff compared to  
18 who they are as class plaintiffs. I am not -- I'm not  
19 ruling that out here. I'm not saying that you can only get  
20 what's unique to your role as DAPs.

21 If you could show that there was something that  
22 was missed, whether it was unique to your role as DAPs or  
23 just by saying there's a gap here and these search terms  
24 didn't cover that gap and here's why that gap's important,  
25 then the burden would shift to the defendants to run that



1 hit list for the search term or terms you're proposing and  
2 engage in that proportionality analysis. Yes. I see what  
3 you're going after, here's how burdensome it would be.  
4 Let's talk about a different way of getting there.

5 So I think there are scenarios under which the  
6 burden can be triggered on the defendants to show burden but  
7 the -- I am rejecting the sort of baseline premise that as  
8 DAPs you get your free shot at a bunch of search terms where  
9 it really looks like overwhelmingly the issues have been  
10 covered by the work that was already done.

11 Another scenario, and this is why I asked about  
12 Rule 34 requests, certainly if after you negotiate with the  
13 defendants the metes and bounds of their responses to  
14 Rule 34 requests, and you can show why the search terms that  
15 were run weren't adequate to address those Rule 34 requests.  
16 That's something you can raise.

17 And, again, the defendants may need to -- may then  
18 need to engage with you on the burden of filling that -- of  
19 filling that gap.

20 Defendants, and you quoted the Sedona Principles,  
21 of course, those are near and dear to my heart, defendants  
22 have a responsibility to and are often, as Sedona notes, are  
23 in the best position to come up with a search strategy that  
24 will fulfill their obligations but that also puts an  
25 obligation on them so they, too, will need to be confident

1 And as always, a thanks to our court reporter for  
2 her seeing us all the way through the process.

3 We're adjourned.

4 (Court adjourned at 4:00 p.m.)

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8 **REPORTER'S CERTIFICATE VIDEO CONFERENCE**

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11 I certify the foregoing pages of typewritten  
12 material constitute a full, true and correct transcript of  
13 the video conference hearing, as they purport to contain, of  
the proceedings reported by me at the time and place  
hereinbefore mentioned.

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14

/s/Lynne M. Krenz

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Lynne M. Krenz, RMR, CRR, CRC

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